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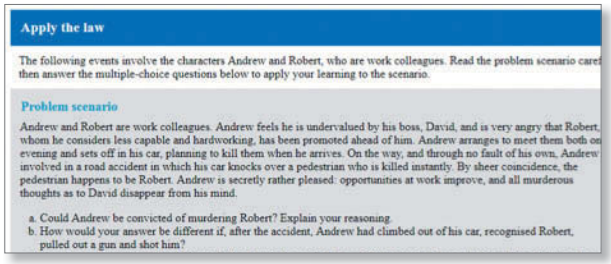

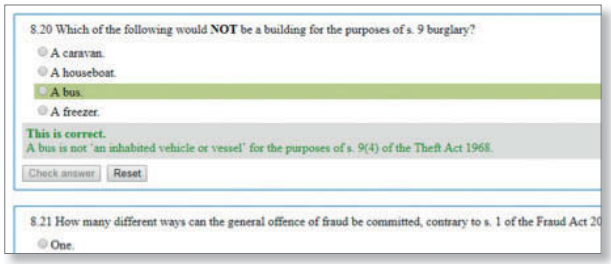

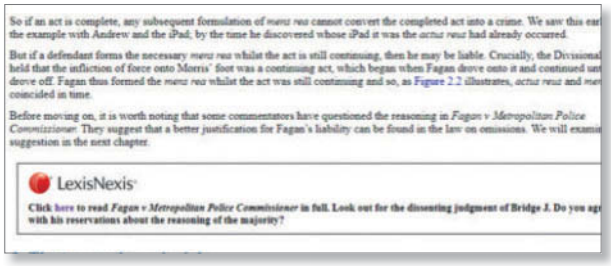

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Unlawful act manslaughter

There is no statutory definition of unlawful act manslaughter. So instead we must look at how it was defined by the House of Lords in *DPP v Newbury & Jones* [1977] AC 500. In this case Lord Salmon stated that a person is guilty of unlawful act manslaughter if:

> he intentionally did an act which was unlawful and dangerous and that act inadvertently caused death.

This tells us that the offence has the following five requirements:

1. The defendant did an act
2. The act was unlawful
3. The act was dangerous
4. The act caused the victim's death
5. The defendant intended to do the act.

(In *R v Dalby* [1982] 1 WLR 425 Waller LJ suggested that there is a further requirement, namely that the unlawful and dangerous act was 'directed at the victim'. However, this is inconsistent with other decisions[42] and was rejected by the House of Lords in *Attorney-General's Reference (No 3 of 1994)* [1998] AC 245.)

Numbers 1, 3 and 4 on the list above are *actus reus* requirements. Number 2 includes both *actus reus* and *mens rea* requirements. Number 5 is a *mens rea* requirement. We will work through them in turn.

1. The defendant did an act

In other words, a defendant cannot commit unlawful act manslaughter by omission.[43] So if you are answering an exam problem question on involuntary manslaughter and the defendant's conduct constituted an omission, not an act, this offence will not apply. You should consider gross negligence manslaughter instead.

2. The act was unlawful

The second requirement is that the defendant's act was unlawful. Here, the word 'unlawful' has been understood to mean criminal. So it is not enough to show that the defendant's act was a civil wrong. It must have been a criminal offence. An example which illustrates this is *R v Franklin* (1883) 15 Cox CC 163. The defendant was walking along Brighton Pier on a bank holiday Monday when he picked up a 'good sized box' from a refreshments stall and threw it into the sea. The box landed on a swimmer who was swimming underneath the pier and killed him. At trial, the prosecution's case was that the defendant's actions amounted to the tort of trespass to goods. Field J stated that proof of a tort was insufficient to establish liability for unlawful act manslaughter:

> the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case

A more recent example is *R v Lamb* [1967] 2 QB 981. The defendant, Terence Lamb, had acquired a revolver. The revolver had a five-chambered cylinder which rotated when the trigger was pulled. One day the defendant was joking around with his best friend, the

[42] Such as *R v Mitchell* [1983] QB 741.
[43] *R v Lowe* [1973] QB 702.

victim Timothy O'Donaghue. He pointed the revolver at O'Donaghue and pulled the trigger. Although there were two bullets in the chambers, neither Lamb nor O'Donaghue expected the gun to fire because neither bullet was in the chamber opposite the barrel. Neither realised that when the trigger was pulled the cylinder would rotate and place a bullet opposite the barrel. O'Donaghue was killed. At trial it was accepted that Lamb had not realised that the gun would fire. Three experts testified that Lamb's mistake was a natural one for somebody who was unfamiliar with firearms. Lamb was nonetheless convicted. Importantly, the trial judge told the jury that it was unnecessary for them to decide whether or not Lamb had committed the crime of assault. Lamb appealed against his conviction, arguing that the judge had misdirected the jury. In the Court of Appeal Sachs LJ held that the act in question must have been a crime:

> It is long settled that it is not in point to consider whether an act is unlawful merely from the angle of civil liabilities.

Lamb's appeal was therefore successful. Without proof that he had committed an assault he could not be convicted of unlawful act manslaughter.

Before moving on, it is important to note two further points:

- Whilst the unlawful act must be a crime, it does not have to be a crime of violence. For example, in a few pages' time we will look at *R v Watson* [1989] 1 WLR 684. In this case the relevant crime was burglary. Another example is *R v Goodfellow* (1986) 83 Cr App R 23, where the relevant crime was criminal damage.
- The prosecution must prove both the *actus reus* and the *mens rea* of the crime in question. So if the relevant offence is battery, the prosecution must establish both the *actus reus* and *mens rea* of battery.

3. The act was dangerous

The third requirement is that the act was dangerous. Here we need to consider two issues: first, what test is used to assess dangerousness; and, second, what information may the jury take into account when applying this test?

i. The test for dangerousness

The courts have developed a legal test which must be applied when deciding whether or not the defendant's unlawful act was dangerousness. One of the most common mistakes students make when answering exam problem questions on unlawful act manslaughter is to apply their own understanding of the word 'dangerous' instead of applying the test the courts have set out.

The first point to note about the test for dangerousness is that it is an objective test. Lord Salmon in *DPP v Newbury & Jones* stated:

> In judging whether the act was dangerous, the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger.

So, when applying the dangerousness test, you must focus on what the reasonable person would have foreseen, not on what the defendant himself foresaw. No concession is made for individual characteristics, such as age or mental capacity.[44]

[44]This is illustrated by *R v JF & NE* [2015] EWCA Crim 351. JF and NE were both young people (aged 14 and 16 respectively), and JF had an exceptionally low IQ (such that a psychologist said that JF's answers in police interviews should be judged as if he were a six-year-old). The Court of Appeal rejected defence counsel's suggestion that the objective test for dangerousness should be reconsidered, stating that 'the law is clear and well established' and that it is 'for Parliament to determine' whether reform is needed ([33]).

Second, in *R v Church* [1966] 1 QB 59 Edmund Davies J explained that, for the act to qualify as dangerous, the prosecution must show that the reasonable man would have foreseen a risk that the victim would suffer some harm. Importantly, he explained that the reasonable man need not have foreseen a risk of serious harm:

> The unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

The scope of the *R v Church* test was considered in *R v JM & SM* [2012] EWCA Crim 2293. In this case the Court of Appeal had to consider whether it is necessary to show that the reasonable man would have foreseen the type of harm that the victim suffered. The victim in *R v JM & SM* was 40-year-old Peter Jopling. He worked at a nightclub as a doorman and was believed to be in good health. One evening the two defendants were ejected from the club and then tried to force their way back in. Jopling was one of the doormen who dealt with them. Shortly after the disturbance Jopling collapsed and died. It was later discovered that he had been suffering from a renal artery aneurysm. The shock and surge in blood pressure triggered by the disturbance had caused the aneurysm to rupture. The two defendants were charged with affray and unlawful act manslaughter.

At trial the judge ruled that, even if the jury decided that the defendants had committed an unlawful act (the offence of affray[45]), there was no evidence on which they could convict the defendants of unlawful act manslaughter. The judge stated that the *R v Church* test for dangerousness is only satisfied if the reasonable man would have foreseen the *type* of harm that the victim suffered. The prosecution appealed against this, arguing that it placed an unwarranted restriction on the scope of the *R v Church* test.

EXTRACT

Read the following extract from the judgment of Lord Judge CJ. For the dangerousness test must the prosecution prove: (1) that the reasonable man would have foreseen a risk that the victim would suffer the type of injury the victim suffered; or (2) that the reasonable man would have foreseen a risk of some injury (not necessarily the sort of injury the victim actually suffered)?

R v JM & SM [2012] EWCA Crim 2293

Lord Judge CJ

18 [T]he judge misdirected himself when he required the Crown to establish [...] that the reasonable and sober person envisaged in *R v Church* must realise that there was a risk that the unlawful act would cause the sort of physical harm as a result of which the victim died. We agree that such a requirement provided a gloss on the ingredients of this offence which is not justified by the authorities [...] Indeed, the observations at the end of the judgment appear to elevate the requisite risk from an appreciation that some harm will inevitably occur into foresight of the type of harm which actually ensued and indeed the mechanism by which death occurred. Of course, unless the Crown can prove that death resulted from the defendant's unlawful and dangerous act, the case of manslaughter would fail on causation grounds. However a requirement that the bystander must appreciate the "sort" of injury which might occur undermines the "some" harm principle explained in *R v Church*

[45]Public Order Act 1986, s.3.

[...]

20 In our judgment, certainly since *R v Church* [1966] 1 QB 59 and *Director of Public Prosecutions v Newbury* [1977] AC 500, it has never been a requirement that the defendant personally should foresee any specific harm at all, or that the reasonable bystander should recognise the precise form or "sort" of harm which did ensue. What matters is whether reasonable and sober people would recognise that the unlawful activities of the defendant inevitably subjected the deceased to the risk of some harm resulting from them.

[...]

22 In our judgment there is evidence from which a jury properly directed could conclude that sober and reasonable people observing events on 12 December 2012 would readily have recognised that all the doormen involved in the effort to control the defendants were at the risk of some harm, and that the fatal injury incurred while it was in progress or in its immediate aftermath while Mr Jopling was still subject to its effects.

23 Accordingly this appeal will be allowed.

The Court also stated that, whilst general stress and anxiety do not amount to harm for the purposes of the *R v Church* test, emotional shock does. This followed the decision in *R v Watson*, which we will look at shortly.

So, to summarise, the test for dangerousness is an objective one. The prosecution must show that the reasonable man would have foreseen a risk that the victim would suffer some harm. No concession is made for an individual's characteristics, such as age or mental capacity, and it is not necessary to show that the reasonable man would have foreseen the precise type of harm that the victim actually suffered. This test has been widely criticised for setting the bar too low, particularly given that unlawful act manslaughter is a homicide offence. The Law Commission, for example, has stated:[46]

> 1.15 At the less serious end of the involuntary manslaughter spectrum, the law may be too harsh on defendants who kill as a result of an unlawful and dangerous act. The risk of harshness arises when defendants do not realise that the act may cause harm:
>
> EXAMPLE 1: D is seeking to steal a large book from the fourth floor of a library whose windows face on to a busy street. Seeing the librarian coming towards him, D quickly drops the book out of the window. It lands on V's head as she walks underneath the window, killing her.
>
> 1.16 D's theft of the book should not be sufficient to convict D of the manslaughter of V even though, in the circumstances, there was an obvious risk of some harm arising from D's action.

ACTIVITY

- Do you agree that the defendant in the Law Commission's example should not be convicted of manslaughter?
- Do you agree with the Law Commission that the *R v Church* test for dangerousness is too harsh on defendants who do not realise that their unlawful act may cause harm?

[46] Law Commission (2005) *A New Homicide Act for England and Wales? A Consultation Paper* (Consultation Paper No 177).

ii. What information may the jury take into account when applying the dangerousness test?

In some situations there may be particular facts or circumstances which affect the dangerousness of the defendant's act. There are a number of cases in which the courts have set out guidance on when such facts or circumstances may be taken into account.

The first case to consider is *R v Bristow* [2013] EWCA Crim 1540. The victim, Julian Gardner, ran an off-road vehicle repair business from premises on a secluded farm. The four defendants committed a night-time burglary of the business. Gardner interrupted the burglary and attempted to intervene. As the defendants escaped, they drove into Gardner and killed him. At trial the defendants were convicted of unlawful act manslaughter (the unlawful act being the burglary). They appealed against their convictions, arguing that the burglary did not satisfy the *R v Church* test for dangerousness (at least not until one of the defendants started to drive dangerously, which they argued was too late as the prosecution had not proved who ran Gardner over). The Court of Appeal dismissed their appeal.

EXTRACT

Read the following extract from the judgment of Treacy LJ. At what point in time does he say the dangerousness of the burglary should be assessed: before the defendants embarked on the burglary; when Gardner intervened or when the defendants started to drive dangerously?

What reasons does Treacy LJ give for saying that the burglary satisfied the *R v Church* test for dangerousness?

R v Bristow [2013] EWCA Crim 1540

Treacy LJ

16 The prosecution case [...] was one of unlawful act manslaughter. The unlawful act was alleged to be the burglary of the farm, which was committed as a joint enterprise. Although the Crown could not say who was driving the vehicle or vehicles that had struck Mr Gardner, they asserted that each appellant took part in the burglary and in doing so, in the particular circumstances, foresaw a real possibility that somebody intervening at the scene might suffer harm as a result of the carrying out of the burglary, including harm caused during their escape from the scene. The presence of residential farm buildings would have alerted the appellants to the risk of being caught in the act of burglary, which would result in the need to escape promptly from the scene in vehicles along the single track.

17 In those circumstances a reasonable bystander would, the Crown submitted, recognise the risk of some harm being caused to a person intervening at night, in the dark, in a relatively confined space, where powerful vehicles were involved, and there was only one route of escape from the workshops. In this context, it is worth recording that the jury went on a view of the scene as well as having many still images provided.

[...]

34 This is not a case [...] where the circumstances demonstrating the risk of harm to the occupier of property did not arise until a point during the burglary or at all. Whilst burglary of itself is not a dangerous crime, a particular burglary may be dangerous because of the circumstances surrounding its commission. We consider that the features identified by the Crown, as set out

earlier in this judgment, were capable of making this burglary dangerous when coupled with foresight of the risk of intervention to prevent escape.

35 In those circumstances we consider that the features of this crime were sufficient for the burglary to be capable of being an unlawful act which a reasonable bystander would inevitably realise must subject any person intervening to the risk of some harm resulting

[...]

37 Since the crime to be focussed on was the burglary, we reject Mr Nelson's submission as to the point at which foresight and danger were to be assessed. We consider that on the facts of this case the judge was correct to focus the jury's attention on the period up to the inception of the burglary. It is that question which lies at the very heart of the submissions made on behalf of the appellants, namely the point in time at which foresight and recognition of danger arose. What needed to be considered was the foresight of the participants as they embarked upon the crime, and what, if anything a reasonable bystander would inevitably have recognised as a risk of physical harm to any person intervening.

So in *R v Bristow* the information which demonstrated the dangerousness of the act was available to the defendants before they committed the burglary. The application of the *R v Church* test was therefore based on what the reasonable person would have foreseen at the moment the defendants embarked on the crime. But what if there are special facts or circumstances which only become evident whilst the crime is being committed? This was the issue in *R v Watson* [1989] 1 WLR 684. The defendant, Clarence Watson, broke into the home of an 87-year-old man named Harold Moyler, who had a weak heart. Moyler woke up whilst Watson was in the house. Watson verbally abused him and then escaped. Shortly afterwards Moyler suffered a fatal heart attack. At trial the judge told the jury that, when applying the *R v Church* test, they could take into account information which became available to Watson during the course of the burglary (including the fact that Moyler was frail and elderly). Watson was convicted of unlawful act manslaughter. He appealed against his conviction, arguing that the trial judge had misdirected the jury.

EXTRACT

According to the following extract from Lord Lane CJ's judgment, had the trial judge misdirected the jury? When applying the *R v Church* test may the jury take into account facts and circumstances which become evident to the defendant?

R v Watson [1989] 1 WLR 684

Lord Lane CJ

The judge clearly took the view that the jury were entitled to ascribe to the bystander the knowledge which the appellant gained during the whole of his stay in the house and so directed them. Was this a misdirection? In our judgment it was not. The unlawful act in the present circumstances comprised the whole of the burglarious intrusion and did not come to an end upon the appellant's foot crossing the threshold or windowsill. That being so, the appellant (and therefore the bystander) during the course of the unlawful act must have become aware of Mr. Moyler's frailty and approximate age, and the judge's directions were accordingly correct.